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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTOMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP AND PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 Judge: James P. Reynolds **FT. HARRISON VETERANS RESIDENCE, L.P.'S MOTION FOR SUMMARY JUDGMENT**

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison"), by and through its counsel of record, hereby moves the Court pursuant to Mont. R. Civ. P. 56 for summary judgment on its petition for judicial review and alternative request for declaratory judgment. A brief in support of this motion is filed contemporaneously.

Dated this 5th of October, 2012.

CROWLEY FLECK PLLP

Michael Green
Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 5th day of October, 2012, I had hand delivered, a true and correct copy of the foregoing to the following:

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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent. CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTOMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP AND PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 Judge: James P. Reynolds **FT. HARRISON VETERANS RESIDENCE, L.P.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison"), by and through its counsel of record, hereby submits this brief in support of its motion for summary judgment on its petition for judicial review and alternative request for declaratory judgment. The Court should reverse the Montana Board of Housing's (the "MBOH") low-income housing tax credits ("LIHTC") allocation for 2012 because the undisputed facts of this case show that the Board did not comply with the Montana Administrative Procedures Act ("MAPA") or the general standards for agency decisions. The Court should also declare portions of all of the 2012 Qualified Allocation Plan ("QAP") invalid because it does not comply with federal law.

INTRODUCTION

LIHTCs are critical to low-income housing projects. Denial of LIHTCs generally renders a project unviable. As such, Montana law requires the Board follow proper procedure and base the allocation of LIHTCs on transparent process, using concrete standards to which all applicants have access. That did not happen in this case. Instead, the scoring criteria became fluid and arbitrary, and the Board and staff failed to comply with the 2012 QAP and state and federal law.

The Board failed to comply with the procedural standards put into place, pursuant to MAPA, to avoid an arbitrary decision. It made no attempt to provide a proper hearing, which is designed to reveal and resolve problems with the application process that may have affected the Board's decision. As a result, Ft. Harrison had no opportunity to discover, question, or correct these problems until after the Board made its decision. This alone is sufficient basis to reverse the Board's decision.

If the Court finds it necessary to inquire into the substantive merits of the case, however, the Board's decision must be reversed because it was arbitrary, capricious, and unlawful. In this case, and consistent with past practice, the Board made its decision based on its staff's scoring. Had Ft. Harrison's application been properly scored, it would have tied for the highest scoring project and received the full allocation of LIHTCs. The scoring, however, was done in an arbitrary manner. The staff unilaterally negated a section of scoring criteria without alerting the Board or the applicants. It allowed some applicants to supplement their application responses and materials, while not offering an equal opportunity to others. It also scored Ft. Harrison's application on undisclosed metrics that impermissibly added to the scoring criteria in the QAP. The Board also considered impermissible factors during the decision-making process. These deficiencies ultimately led to the Board denying Ft. Harrison's requested allocation of LIHTCs These problems require reversal under MAPA or general standards of judicial review of an agency's decision.

Finally, the Court must rule part or all of the 2012 QAP invalid because it violates federal law. The 2012 QAP impermissibly violates upon the Commerce Clause of the U.S. Constitution. A state cannot discriminate against out-of-state entities in the award of LIHTCs. The 2012 QAP provides an advantage to those companies who utilize Montana-based companies and involve local entities in their projects. The Court must strike these offensive provisions and order the

Board to properly score Ft. Harrison's application, and allocate LIHTCs to Ft. Harrison accordingly.

UNDISPUTED BACKGROUND FACTS

The facts cited in this brief are undisputed. They are taken from the testimony of the Board's Multifamily Program Manager, Mary Bair, as well as the documents the Board provided in response to Ft. Harrison's information request and in support of the Board's pending motion to dismiss[1]. General facts, providing background, are included in this section. Additional undisputed facts are provided throughout the brief and to avoid duplication will not be restated here.

The allocation of LIHTCs is governed by 26 U.S.C. § 42. This statute requires LIHTCs be issued "pursuant to a [QAP]." 26 U.S.C. § 42(m)(1)(A). The QAP must "set[] forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." *Id.* § 42(m)(1)(B). Administrative rules require the staff "evaluate each project for conformance with the criteria in the QAP, using the point system provided therein." ARM 8.111.603(3).

On January 20, 2012, Ft. Harrison submitted its application for Montana LIHTCs. Ft. Harrison planned to develop a housing project to serve low income, homeless and/or disabled veterans and their families in historic buildings located on Fort Harrison, outside of Helena, Lewis and Clark County, Montana (the "Freedoms Path Project"). A total of 15 applicants submitted applications in the allotted time period, requesting more tax credits than were available for 2012. (Bair Aff., p. 2, ¶ 4.) The Board heard presentations from all applicants at its February 13, 2012, meeting as required by the newly revised ARM 8.111.603(3). (Bair Depo., p. 2, ¶ 5.) Ft. Harrison presented in favor of the Freedoms Path Project. (*See id.*) After the February meeting, the staff scored the applications. (*See id.* at 2-3, ¶ 6.) The staff awarded the Freedoms Path Project 100 out of 108 possible points. (*Id.* at 3, ¶ 7.) Ft. Harrison contested the scoring and submitted information, asking the Board staff to reconsider the scoring. (*Id.* at 3, ¶ 8.)

The Board held a "hearing" on April 9, 2012, to choose the recipients of LIHTCs for 2012, pursuant to ARM 8.111.603(5). (Ex. K to Bair Aff.) When Ft. Harrisons' request for

[1] Ms. Bair's Affidavit was previously filed with the Court on July 27, 2012. A copy of Ms. Bair's deposition transcript was filed with the Court on September 21, 2012, as Exhibit A to Ft. Harrison's Submission of Additional Materials, Resp. to Materials Submitted by the Board and Intervenors, and Request for Oral Argument, hereinafter referred to as "Additional Materials."

scoring review was presented to the Board, a Board member asked the staff if the information changed the staff's scoring. (*Id.* at 8.) Staff replied it "was comfortable that the project was scored in conformance with the provisions of the QAP" and no change was made. (*Id.*) The top-scoring applicant received a score of 106 and was awarded the full amount of LIHTCs it requested. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials.) The next highest-scored applicants received scores of 105 and were also awarded the full amount of LIHTCs they requested. (*Id.*) The Freedoms Path Project received no LIHTCs. (*Id.*)

Mary Bair, Manager of the Board's Multi-Family Program, responsible for receiving and scoring the applications with other staff members, testified the scoring determined which applicants received LIHTCs. (Bair Depo. 22:5-18, 119:12-14, 22-24.) Although the Board has the authority to consider other factors listed in the 2012 QAP, it did not do so. (*Id.*) The Board does not receive the full applications, so it cannot review them. (*Id.* 63:12-15.) It bases its decision on the limited information the staff supplies, which consists mainly of a scoring summary and financial information. (*Id.* 63:12-22; 106:15-107:7.) The minutes of the April 9, 2012, meeting also indicate staff gave recommendations to the Board, which Ms. Bair later testified was likely based simply on the scoring of the applications. (Ex. K to Aff. of Mary Bair; Bair Depo. 63:23-64:24.) In the past 10 years, the Board has ventured outside the scoring for its final decision only three or four times. (Bair Depo. 65:9-18.)

On April 23, 2012, Ft. Harrison wrote a letter to the Board requesting reconsideration of the decision and rescission of the LIHTC award, which was discussed at the Board's May 3, 2012, meeting, in addition to further presentation by Ft. Harrison's representatives. (Ex. M to Bair Aff., pp. 3-7.) However, the Board refused to reconsider the LIHTC allocation. (*Id.* at 7.) Ft. Harrison then filed its petition with the Court.

STANDARDS OF REVIEW

Summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont.R.Civ.P. 56(c)(3). Under Montana law, "the party moving for summary judgment has the initial burden of proving that no genuine issues of material fact exist. The burden then shifts to the non-moving party to prove by more than mere denial and speculation that a genuine issue of material fact does exist." *Steadele*

v. Colony Ins. Co., 2011 MT 208, ¶ 14, 361 Mont. 459, 260 P.3d 145 (citing *Roy v. Blackfoot Telephone Co-op.*, 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301).

Summary judgment is the appropriate method of disposition in this case if the Court considers additional evidence under §§ 2-4-703 and -704, MCA, as the Board did not maintain records compliant with MAPA. These facts are undisputed, and the Courts decision may be issued as a matter of law. *See* Mont.R.Civ.P. 56(c).

Pursuant to MAPA, a district court may reverse or modify an agency's decision if an appellant's substantial rights have been prejudiced because:

> (a) the administrative findings, inferences, conclusions, or decisions are:
> (i) in violation of constitutional or statutory provisions;
> (ii) in excess of the statutory authority of the agency;
> (iii) made upon unlawful procedure;
> (iv) affected by other error of law;
> (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (b) findings of fact, upon issues essential to the decision, were not made although requested.

§ 2-4-704, MCA. " . . . [A] district court reviews an administrative agency's decision in a contested case to determine whether the findings of fact are clearly erroneous and whether the agency correctly interpreted the law." *Montana Solid Waste Contractors, Inc. v. Montana Dep't of Pub. Serv. Regulation*, 2007 MT 154, ¶ 16, 338 Mont. 1, 161 P.3d 837.

Alternatively, where MAPA does not apply, agency decisions are subject to judicial review to determine if the agency "has stayed within the statutory bounds and has not acted arbitrarily, capriciously, or unlawfully." *Johansen v. Dep't of Natural Res. and Conservation*, 1998 MT 51, ¶ 26, 288 Mont. 39, 955 P.2d 653 (internal quotation marks omitted) (quoting *North Fork Preservation Ass'n v. Dep't of State Lands and Cenex*, 238 Mont. 451, 457, 778 P.2d 862, 866 (1989)).

ARGUMENT

I. THE COURT SHOULD REVERSE THE BOARD'S DECISION BECAUSE IT FAILS TO MEET PROCEDURAL REQUIREMENTS UNDER MAPA.

Despite the Board's assertions to the contrary, this matter is subject to MAPA, so resolution is straightforward. As explained in Ft. Harrison's response to the Board's motion to dismiss, the Board's allocation of LIHTCs is governed by MAPA because it meets the definition

of a contested case.[2] Briefly, MAPA governs the actions of agencies, which include the Board. *See* §§ 2-4-102; 2-3-102, MCA. A contested case, which must meet MAPA requirements, is defined as "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made **after an opportunity for hearing**." § 2-4-102(4), MCA (emphasis added). The Board's decision meets this definition because it determined the applicants' legal rights regarding LIHTCs, and ARM 8.111.603(3) requires the opportunity for a hearing before the decision was rendered. There is no legal authority for the concept of an agency exempting itself from MAPA by rule or deliberate non-compliance.

The Court must reverse the Board's decision because the Board's failure to apply the most basic procedural requirements prejudiced Ft. Harrison's rights. Montana law mandates all contested cases comply with certain procedural requirements, including an opportunity for discovery, a hearing at which testimony can be presented and witnesses examined, and a verbatim record. *See* §§ 2-4-601, 602, 612, and 614, MCA. As stated above, the Court must reverse the Board's decision because Ft. Harrison's rights have been prejudiced by the Board's failure to comply with these requirements. *Id.* § 2-4-702(2).

There can be no dispute the Board prejudiced Ft. Harrison's rights by failing to provide a proper hearing. Under Montana law, each contested case requires that the parties be afforded a hearing, with the opportunity "to respond and present evidence and argument," provide testimony under oath, and "conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence." *Id.* § 2-4-612. However, the Board made no effort to provide these procedural requirements. Instead, it has repeatedly asserted MAPA does not apply in this matter. (*See* Board's Br. in Supp. of Mot. to Dismiss, pp. 9-15.)

The Board's omission of a proper hearing prejudiced Ft. Harrison's rights. If Ft. Harrison had been allowed discovery and a hearing, it could have uncovered and potentially resolved the deficiencies in the scoring and allocation process, which are set out in detail below. Through cross-examination, Ft. Harrison could have identified the deficiencies and/or inconsistencies in the scoring process, thereby providing the Board more information to make its final decision. Ft. Harrison could have presented evidence and argument in a proper setting,

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[2] Ft. Harrison's arguments in its response brief regarding this issue are incorporated herein by reference. (*See* Ft. Harrisons' Resp. Br., pp. 8-12.)

which would have allowed meaningful consideration of its case. Instead, Ft. Harrison was forced to resort to this Court for full and fair discovery and consideration of the facts.

The Court should reject the Board's argument that failure to comply with MAPA requirements for contested case hearings proves that the hearing was not a contested case. This circular reasoning allows the Board to use its own failures to avoid judicial review. The violation of MAPA requirements should not be considered evidence that MAPA does not apply. Furthermore, the Court must reject the Board's claim that MAPA "do[es] not apply where there is no 'evidentiary record.'" The Board's citation to *North Fork Preservation Ass'n v. Dep't of State Lands*, is an oversimplification of the Montana Supreme Court's holding. (Board's Br. in Supp. of Mot. to Dismiss, p. 14.) The Supreme Court's decision considered whether the case met the statutory definition of "contested case." *North Fork*, 238 Mont. 451, 457, 778 P.2d 862, 866 (1989). Unlike *North Fork*, the circumstances of this case meet the statutory definition. The failure to preserve the required record and follow the proper procedure established a fatal violation of MAPA, not an exclusion from it.

On this basis, the Court should reverse the Board's decision, and order the Board to hold a hearing with the proper procedural safeguards in place.

II. THE COURT SHOULD REVERSE THE BOARD'S DECISION BECAUSE THE ALLOCATION FAILED TO MEET SUBSTANTIVE REQUIREMENTS UNDER MAPA.

If the Court decides not to reverse the Board's decision based on its violations of MAPA procedural requirements, MAPA allows the Court to consider the merits of the case. This is true despite the Board's failure to provide a proper record. First, "[i]n cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court." § 2-4-704(1), MCA. Ft. Harrison now presents these undisputed facts as outlined above and asks the Court to issue summary judgment in its favor.

Alternatively, the Court may also reverse and remand the decision and order the Board to consider Ft. Harrison's additional evidence. MAPA allows the Court to order an agency to consider evidence the Court finds "is material and there were good reasons for failure to present it in the proceeding before the agency." § 2-4-703, MCA. The agency may then "modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court." *Id.* In this case, Ft. Harrison had no way to obtain the information regarding the Board's failures until it was able to

request materials from the Board and conduct formal discovery before the Court. Therefore, these facts are now properly before the Court and require reversal of the Board's LIHTC award.

A. The Board's Decision was Arbitrary, Capricious, Characterized by an Abuse of Unwarranted Discretion, and Contrary to State and Federal Law.

Under Montana law, the Board is required by Executive Order 2-87 to "perform the tax credit allocation functions for the State of Montana **pursuant to 26 U.S.C. 42**." ARM 8.111.601(1) (emphasis added). Allocation of LIHTCs are governed by 26 U.S.C. § 42, which requires LIHTCs be issued pursuant to a QAP, which must "set[] forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions." *Id.* § 42(m)(1)(A)-(B).

The 2012 QAP sets out thirteen "Development Selection Criteria" for which an applicant for LIHTCs may be awarded the corresponding number of points, which include "Project Location," "Demonstration of Montana Presence," and "Tenant Populations with Special Housing Needs." (2012 QAP, pp. 19-24.)[3] The staff scores each applicant's proposed project, and presents the scores to the Board. ARM 8.111.603(3). While the Board purports to reserve some discretion to itself, neither federal law nor the 2012 QAP permits the staff discretion to vary from the QAP provisions in the determination of who qualifies for LIHTC allocation or in scoring.

The 2012 QAP gives the Board the discretion to consider factors beyond the scoring criteria to select projects "it determines best meet the needs of low income people," but the Board must consider only the additional criteria listed in the 2012 QAP. (2012 QAP, p. 25.) These additional criteria are: the geographical distribution of tax credit projects; the rural or urban location of the projects; the overall income levels targeted by the projects; rehabilitation of existing low income housing stock; sustainable energy savings initiative; financial and operational ability of the applicant to fund, complete and maintain the project through the extended use period; past performance of an applicant in initiating and completing tax credit projects; and cost of construction, land and utilities. (2012 QAP, pp. 24-25.) However, if the Board considers these additional factors, federal law and the 2012 QAP require the Board to "publish a written explanation that will be made available to the general public." (26 U.S.C. §

[3] The 2012 QAP was filed with the Court on June 21, 2012, as Exhibit C to Respondent's Brief in Support of Motion to Dismiss Pursuant to Mont. R. Civ. P. 12(b).

42(m)(1)(A)(iv); 2012 QAP, p. 25; Bair Depo. 119:6-9.) The Board cannot consider any other criteria.

1. The Board violated federal law by considering criteria outside the 2012 QAP in refusing to allocate LIHTCs to Ft. Harrison.

According to the minutes from the April 9, 2012, meeting at which the Board made its allocation decision, a member "voiced concern whether tax credits were the best source of funding for veteran needs." (Ex. K to Bair Aff., p. 8.) This criterion is not found in the Development Selection Criteria or the additional criteria the Board may consider, pursuant to the 2012 QAP. (*See* 2012 QAP, pp. 19-25.) Nor does the 2012 QAP provide any basis for rejecting use of LIHTCs for housing projects for otherwise qualifying veterans. (*See id.*) Therefore, according to federal law, the Board cannot consider it. This factor was not selected objectively or from any approved list of topics. It was an arbitrary and unwarranted abuse of discretion by the Board and establishes grounds for reversal of the Board's decision.

2. The Board's final awards relied exclusively on staff scoring, which was marred by the staff's inconsistent and arbitrary decisions in direct contravention of state and federal law.

The Court must reject any suggestion that it should not consider the scoring in its review of the Board's final decision. Regardless of the discretion the Board may have, it consistently makes its LIHTC allocation decisions based on the staff's scoring, and did so in this case. As a result, the scoring of the applications is an important consideration in determining whether the Board's final decision withstands MAPA or non-MAPA review. Ms. Bair testified that Board made its decision based on the scoring of the applications. (Bair Depo. 119:22-24.) This is consistent with past practice. In the past 10 years, the Board has ventured outside the scoring for its final decision only three or four times. (Bair Depo. 65:9-18.) The minutes also indicate the staff gave recommendations to the Board, which Ms. Bair later testified were likely based simply on the scoring of the applications. (Board Meeting Minutes, Apr. 9, 2012, p. 5, Ex. K to Bair Aff.; Bair Depo. 63:23-64:24.) Therefore, the scoring of the applications ultimately decided which projects were allocated LIHTCs.

The Board does not oversee the staff's scoring and is in no position to do so. In fact, the Board did not review the applications. (*Id.* 63:12-22.) The Board bases its decisions on the limited information the staff supplies. (*Id.* 63:12-22.) Despite the fact that most applications are hundreds of pages long, the information the Board receives from the staff is largely a scoring

summary and financial information, which is approximately seven pages long. (*See id.* 63:12-22; 106:15-107:7; Ex. B to Ft. Harrison's Additional Materials.) This stark disparity demonstrates how critical accurate, objective and transparent scoring by the staff is in the allocation process. Considering these facts, the following abuses of discretion in the scoring process prejudiced Ft. Harrison's rights.

First, the staff unilaterally negated the Energy and Green criteria from Development Selection Criteria No. 5, Project Characteristics, by awarding all applicants the full 10 points regardless of the merits of their applications. (Bair Depo. 54:22-55:2.) The staff decided to effectively nullify the criteria because several applicants "missed those points." (*Id.* at 59:8-9.) The staff apparently inferred that the applicants should have received better scores, but "didn't interpret [the Energy and Green criteria] the way [the staff] thought it was written." (*Id.* 55:1-2.) As a result, the staff awarded the maximum total points to all applicants based on their assumptions about the applicants' intent. According to the staff, each applicants apparently had the "intent [to get the full points for this Selection Criteria], they just didn't follow through far enough." (*Id.* 124:25-125:5.)

The 2012 QAP does not authorize the staff to eliminate portions of the Development Selection Criteria. Therefore, the staff did not score the applications pursuant to the 2012 QAP or use the Selection Criteria as required by federal law. The staff's decision was not based on any accepted document or objective criteria. Their arbitrary decision necessarily benefitted some applicants to the detriment of others. This is especially significant because of the amount of points involved. The 10 points available for the Energy and Green criteria alone could have changed the entire outcome of the allocation. (2012 QAP, pp. 21-22.) Ft. Harrison was only five points lower than the applicants that received LIHTCs. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials.) In addition, this action is a stark departure from past practice. The same Energy and Green criteria was part of the 2011 QAP. (*Id.* 61:10-11.) However, in that year, the staff did not negate this scoring criteria even though there was "some" confusion over the issue. (*Id.* 61:11-23.)

In addition, despite this scoring criteria being important to the Board, the staff did not inform the Board of the staff's decision to negate this portion of the Selection Criteria. (*Id.* 81:17-24, 124:6-11.) As a result, the Board decision is necessarily tainted by the staff's actions.

The Board issued its final decision without any knowledge that the staff had negated the Energy and Green criteria from the scoring.

Second, the staff arbitrarily decided to allow some applicants to "clarify" information their application and submit additional materials for consideration, while other applicants were not given an equal opportunity. The staff actively contacted some applicants based on its own discretion, not on objective criteria. After the submission of applications, the staff would call or email applicants to get "clarifications" if the applicants submitted materials that were not "completely filled out" or to supplement their applications. (*Id.* 28:23-29:10.) The staff allowed "all kinds" of clarifications depending on what the staff was requesting. (*Id.* 29:25-30:3.) There was no objective criteria used to ensure all applicants equally benefitted from the staff's discretion, and in many cases there was no record of the correspondence itself. Ms. Bair testified that it would "[s]ometimes just make a note in our notes" or on a notebook of telephone calls in general. (*Id.* at 30:12-13, 31:1-6.) This information was not shared with other applicants and was not provided to the Board.

Nothing in the 2012 QAP allows for the late submission of application materials or allows the staff to decide which applicants will benefit from follow-up contact regarding additional information. Although the 2012 QAP allows "minor corrections," this opportunity should have been made available to all applicants. These acts are evidence that the Board's decision was tainted by the staff's arbitrary actions. It also shows the applications were not scored in accordance with the 2012 QAP, despite the Board's assertions to the contrary.

3. The staff's arbitrary application of the scoring criteria directly prejudiced Ft. Harrison.

Finally, the staff's errors in the scoring process directly caused detriment to Ft. Harrison in the application process. The staff scored the applications according to undisclosed factors it essentially made up during the scoring process. These factors were never disclosed to Ft. Harrison, or the other applicants, and in some cases worked in direct contrast to the 2012 QAP Selection Criteria. Ft. Harrison was the only applicant to receive less than the total possible points on two of the Selection Criteria—Project Location and Demonstration of Montana Presence. Ms. Bair's testimony establishes that the staff did not follow the 2012 QAP regarding these Selection Criteria or Tenant Populations with Special Housing Needs, another Selection Criterion where Ft. Harrison received less than the total amount of points possible.

First, Ft. Harrison was the only applicant to receive two rather than the full three points possible for Project Location. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials; 2012 QAP, p. 20.) The 2012 QAP requirements to receive full points for the project location criteria are: "[d]evelopments located in a given area where amenities and/or services will be available to tenants (schools, medical services, shopping, transportation)." (2012 QAP, p. 20.) No additional information regarding these criteria is provided in the 2012 QAP. However, when asked about the scoring during her deposition, Ms. Bair responded that Ft. Harrison lost points based on relative distances to grocery stores and entertainment, and the types of roads surrounding the project. (Bair Depo. 94:19-95:6, 98:22-11.) " . . . [Y]ou're talking about riding a bicycle on a busy highway. And these distances are a fair amount further when you're talking about someone walking or riding a bicycle." (*Id.* 98:22-11.)

These factors are found nowhere in the 2012 QAP. Ms. Bair admitted the 2012 QAP simply provides "a partial list to start to think about" the location and did not "outline the analysis" she applied. (*Id.* 95:11-15, 98:20-22.) Using the staff's factors rather than the criteria outlined in the 2012 QAP violates federal law and QAP itself and results in arbitrary scoring and therefore an arbitrary final decision by the Board.

Second, Ft. Harrison was the only applicant to receive two rather than the full four points possible for Demonstration of Montana Presence. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials; 2012 QAP, p. 23.) The 2012 QAP criteria for Montana presence states:

> In order to assist in providing a better quality product consistent with the purposes of the [Board] and federal law, a development will qualify for points if a member of its development team is Montana based. One (1) point will be awarded for each of the following (0-4 maximum):
>
> - Developer or Project Manager. (A developer has existing affordable housing project(s) in Montana with a demonstrated quality product.)
> - Contract or Construction Manager
> - Either the Consultant, Syndicator, Attorney, Accountant, Architect or Engineers

(2012 QAP, p. 23.) No additional information or interpretation is included in the 2012 QAP.

Ms. Bair conceded at her deposition that Ft. Harrison provided four people identified under this Selection Criteria. (Bair Depo. 75:13-24.) However, it was not awarded the total points possible because the staff believed that only the first two bullet points allow more than one point, while the final bullet point allows only one point. (Bair Depo. 74:2-9.) This factor is not found in the 2012 QAP. According to the staff, the Board realized this Selection Criteria was

"confusing" and "written in a poor way," but not until after the petition for judicial review was filed. (*Id.* 74:15-16.) This was true despite the fact that staff reviewed the language of the criteria after receiving Ft. Harrison's initial letter disputing its score. (*Id.* 77:24-78:1.)

Ms. Bair also testified, that Ft. Harrison did not receive full points on the Montana presence criteria because the descriptions of Ft. Harrison's team members "were not the **overall** development, project or construction manager as contemplated by the QAP provision." (Bair Aff., ¶ 19 (emphasis added).) However, Ms. Bair subsequently admitted that the QAP contains no requirement that a named team member have an "overall" role in the project to qualify for points. (Bair Depo. 141:1-5.) As a result, the staff's actions depart from the 2012 QAP and applied its own arbitrary factors to Ft. Harrison's application for LIHTCs in violation of federal law and the QAP itself. These action negatively impacted only Ft. Harrison, as all other applicants received the full possible points. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials.)

Further, this Montana presence criteria violates the Dormant Commerce Clause. As explained below, the use of tax credits to discriminate against any applicant because it is based outside of Montana, is unconstitutional. *See Maryland v. Louisiana*, 451 U.S. 725, 756, 760 (1981). The Board cannot lawfully award Ft. Harrison fewer points than the other applicants simply because the staff determines Ft. Harrison lacks sufficient Montana presence.

The criteria is unconstitutional even under the interpretation Ms. Bair testified the staff applied to Ft. Harrison. Ms. Bair claimed these criteria is "interpreted and applied by the Board staff in scoring to mean that the listed team members have a physical presence of some kind in the state of Montana, such as owning an affordable housing project in Montana, being licensed in Montana (e.g., a licensed contractor), or having an office in Montana." (Bair Aff., p. 6, ¶ 18.) Ms. Bair later testified that this is because out of state companies "may not understand the climate, the changes in construction, the shortened construction period, and soils and those kinds of things." (Bair Depo. 142:21-143:1.) However, Ms. Bair admitted the staff did not determine whether this was a concern for Ft. Harrison, and the staff reduced the number of points it awarded Ft. Harrison despite the local construction manager Ft. Harrison named in its application. (*Id.* 143:11-20.) Regardless of the attributes Ft. Harrison's development team offered, the staff reduced Ft. Harrison's score, simply because they felt Ft. Harrison lacked sufficient Montana presence as measured by admittedly poorly written criteria. This arbitrary

rule impermissibly draws a line at the Montana border and offers an advantage to developers within the State.

Finally, the staff failed to score Ft. Harrison's application according to the 2012 QAP with regard to Tenant Populations with Special Housing Needs. The requirements for this area are:

> Scoring in this category will be based on identified community and state housing needs, and the extent to which the proposed project addresses those needs. A project will receive one **(1) point for each 10% of the units targeting the following identified needs**:
>
> - Units targeted specifically for individuals with children (Family units 2 bedrooms).
> - Large family units (3 and 4 bedroom).
> - Handicapped units exceeding minimum fair housing requirements.
> - Units targeted specifically for elderly.
> - Units targeted specifically persons of disability (must include written agreement with service provider or advocate for the target group).

(2012 QAP, p. 23 (emphasis added).) Like the other Selection Criteria, the 2012 QAP offers no additional explanation or interpretation of these requirements. When asked to explain why Ft. Harrison did not receive full points in this area, Ms. Bair offered two reasons. First, she claimed Ft. Harrison's application identified only the percentage of rooms that would be dedicated to disabled veterans instead of identifying units. (Bair Depo. 83:23.) Despite the language of the QAP awarding points according to percentage, Ms. Bair claimed double counting units was not permitted and as a result identifying specific units, rather than percentages, was necessary. (*Id.* 84:18-85:1.) Second, the Ms. Bair claimed the services agreement Ft. Harrison submitted did not require the service provider to provide services to disabled residents. (*Id.* 86:25-87:4.)

Neither of these factors are found in the 2012 QAP. The QAP is silent on whether specific units must be identified or what the contents of the agreement must state. The Ms. Bair agreed that no provision of the QAP prohibited double counting units and admitted that the Board "didn't do as good a job as [they] should" in indicating that criterion. (*Id.* at 144:16-22.) Further, neither the QAP or Ms. Bair offered an explanation of why housing for disabled individuals must offer "services" in addition to housing, while other groups are not subject to this requirement. This discriminatory requirement appears to violate the Fair Housing Act and did not provide grounds to deny Ft. Harrison points. As a result, using the staff's arbitrary

discretion to award points exceeds the bounds established by the 2012 QAP and violates federal law.

B. The Board's Decision was Clearly Erroneous in Light of the Whole Record Because a Proper Decision Would Have Resulted in Ft. Harrison Receiving the Requested LIHTCs.

Proper scoring would have resulted in Ft. Harrison receiving a score of 106, which would have made Ft. Harrison the highest scored applicant in 2012. (Selection Criteria, Ex. C to Ft. Harrison's Additional Materials.) Without the staff's imposition of arbitrary and undisclosed requirements on Ft. Harrison's application, its score would have received an additional point for Project Location and two additional points for Demonstration of Montana Presence. Ft. Harrison also would have received an additional three points for Tenant Populations with Special Housing Needs, tying Ft. Harrison for the most points of any applicant.

As a result, Ft. Harrison would have received the full amount of LIHTCs it requested from the Board. As explained above, the Board issued its decision based on the staff's scoring. (Bair Depo. 119:22-24.) The four highest scoring projects in the non-profit/general category were awarded the full amount of LIHTCs. (*See* Applications and Allocations, p. MBOH/2012 LIHTC/009815, attached hereto as Exhibit A.) Therefore, tying for the highest score would have ensured Ft. Harrison the LIHTCs it requested.

These undisputed fact establish that the Board's decision failed to meet substantive requirements under MAPA. Accordingly, they provide sufficient grounds for the Court to grant Ft. Harrison's motion for summary judgment, reverse the Board's allocation, and grant Ft. Harrison the LIHTCs it requested in its application.

III. ALTERNATIVELY, IF THE COURT DETERMINES MAPA DOES NOT APPLY, IT SHOULD REVERSE THE BOARD'S DECISION BECAUSE IT WAS ARBITRARY, CAPRICIOUS, UNLAWFUL, AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As explained in Ft. Harrison's response to the motion to dismiss,[4] agency decision that are not subject to MAPA are nevertheless subject to non-MAPA review. " . . . [I]t is the courts' function to review [cases not subject to MAPA] to determine whether its decision is arbitrary, capricious, unlawful, or unsupported by substantial evidence." *Johansen v. State, Dept. of Natural Res. & Conservation*, 1998 MT 51, ¶ 28, 288 Mont. 39, 955 P.2d 653.

[4] Ft. Harrison's Resp. Br., pp. 12-13.

This analysis largely tracks a MAPA review, because both require reversal if the decision is arbitrary, capricious, or contrary to law. Under MAPA review, a decision cannot be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Similarly, if the decision is unsupported by substantial evidence, the decision must be reversed under the general standard.

In this case, the Board's decision is arbitrary, capricious, unlawful, and unsupported by substantial evidence for the reasons stated above. The Board consideration of factors outside the permitted criteria in the 2012 QAP as well as the staff's improper use of its own arbitrary and undisclosed standards in the scoring process show that the decision was arbitrary and unlawful. The decision is not supported by substantial evidence because had Ft. Harrison's application been properly scored, it would have received as many points as the highest scored applicant, and therefore received its total request for LIHTCs. The Board's acceptance of the staff's decision to erroneously deny Ft. Harrison the full amount of points for Project Location, Demonstration of Montana Presence, and Tenant Populations with Special Housing Needs proves the decision was unsupported by the evidence.

Accordingly, even if the Court determines MAPA does not apply in this matter, it should nevertheless reverse the Board's decision because it does not satisfy the standards of non-MAPA review.

IV. THE COURT MUST ISSUE A DECLARATORY JUDGMENT THAT THE QAP DOES NOT COMPLY WITH FEDERAL LAW BECAUSE THE QAP VIOLATES THE DORMANT COMMERCE CLAUSE.

Regardless of the Court's decision regarding the contested case, all or a portion of the 2012 QAP, which is the basis for the Board's LIHTC allocation decision, is invalid. Provisions of the 2012 QAP violate the Commerce Clause of the U.S. Constitution. Therefore, the Court must strike the offending provisions or invalidate the entire 2012 QAP and order the Board to adjust Ft. Harrison's score and LIHTC allocation accordingly.

The 2012 QAP violates the Dormant Commerce Clause by giving preferential treatment to local business. The U.S. Supreme Court has held the use of tax credits to discriminate against out of state businesses is unconstitutional. *Maryland v. Louisiana*, 451 U.S. 725, 756, 760 (1981); *see also Hughes v. Oklahoma*, 441 U.S. 322, 337 (2005) ("[F]acial discrimination by itself may be a fatal defect" and "[a]t a minimum . . . invokes the strictest scrutiny."); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (" . . . [W]here simple economic

protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."). In *Maryland v. Louisiana*, the U.S. Supreme Court found a Louisiana tax impermissibly discriminated in favor of local interests as a result of several tax credits and exclusions. *Id.* at 760. There, the state of Louisiana imposed a tax on gas imported into the state not previously subjected to taxation by another state. *Id.* at 731. It also allowed tax credits based on criteria that benefitted local business by exempting gas use for certain purposes within the state and giving additional credits for production of minerals within Louisiana. *Id.* at 756.

The U.S. Supreme Court based its decision on "[o]ne of the fundamental principles of Commerce Clause jurisprudence . . . that no State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Id.* at 754. This principle follows "from the basic purpose of the Clause to prohibit the multiplication of preferential trade areas destructive of free commerce anticipated by the Constitution." *Id.* at 755 (internal quotation marks omitted). The U.S. Supreme Court held the tax "unquestionably discriminate[d] against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions." *Id.* at 756. The U.S. Supreme Court also held that once the tax is found to discriminate, the extent of the discrimination is irrelevant. It stated, "[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." *Id.* at 760.

Like the discriminatory tax credits in *Maryland*, the Board's uses discriminatory criteria for awarding LIHTCs. Two of the thirteen Selection Criteria the Board uses to determine which applicants receive LIHTCs are "Demonstration of a Montana Presence" and "Participation of Local Entity." (2012 QAP, p. 23.) Under the demonstration of a Montana presence criteria, applicants can receive up to four points "if a member of its development team is Montana based." (*Id.*)

This criterion violates the Dormant Commerce Clause in the same manner as the tax credits in *Maryland*. Granting additional points for using Montana based entities unquestionably discriminates against interstate commerce by drawing a line at the border for the benefit of Montana businesses. It creates an impermissible preferential trade area within Montana in direct contravention of the free trade envisioned by the U.S. Constitution. It does not matter to what extent the Board's unconstitutional criteria in the 2012 QAP has contributed to discrimination.

As the U.S. Supreme Court stated in *Maryland*, the Court does not need to know the magnitude of the effective of this provision to hold it unconstitutional.

The Court should strike these offensive portions of the 2012 QAP and adjust the scoring and allocation of LIHTCs accordingly. The 2012 QAP is an administrative rule under Montana law. It was adopted through rulemaking procedures by reference. *See* MAR Notice 8-111-000; ARM 8.111.602. As such, the Court has discretion to strike invalid portions of the QAP. *See* § 2-4-506, MCA; *Safeway, Inc. v. Mont. Petroleum Release Compensation Bd.*, 281 Mont. 189, 195, 931 P.2d 1327, 1330-31. Alternatively, if the Court feels it cannot strike the offensive portions, the Court must invalidate the 2012 QAP, pursuant to § 2-4-506, MCA.

CONCLUSION

For all these reasons, Ft. Harrison the Court grant its motion for summary judgment, reverse the Board decision, and direct the Board to award Ft. Harrison its requested amount of LIHTCs.

Dated this 5th of October, 2012.

CROWLEY FLECK PLLP

Michael Green
Attorneys for Ft. Harrison Veterans Residence, L.P.

CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 5th day of October, 2012, I had hand delivered, a true and correct copy of the foregoing to the following:

Greg Gould
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24 West Sixth Avenue, 4th Floor
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Oliver H. Goe
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800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624-1697

CROWLEY FLECK PLLP

* Project information is on the second sheet of this excel workbook

2012 Applications and Allocations
Montana Board of Housing
Low Income Housing Tax Credit Program

Mary S. Bair
Montana Board of Housing
PO Box 200528
Helena MT 59620-0528

406-841-2845
fax 406-841-2841

Available Credit Calculation:

Resident Population			1,000,000
Factor			2.15
Credit Ceiling Available		$	2,465,000
Small State Minimum Ceiling		$	2,525,000
2011 Carryover Available		$	9,920
Returned Credits	Lolo Vista Apartments	$	2,746
Returned Credits	Superior Commons	$	17,685
Total Credits Available		$	2,555,351

Maximum Credit per Developer (25% of ceiling $ 631,250

Set-a-sides:

Small Project	$	511,070
Non Profit	$	255,535
General	$	1,788,746
	$	2,555,351

Allocations:

Project	City	Round	Set-a-side	Amount Requested	Awarded	Section Criteria Points
Haggerty Lane Apartments	Bozeman	1/20/2012		$ 200,000	$ 200,000	98
Sweet Grass Apartments	Shelby	1/20/2012	non profit	$ 200,000	$ 200,000	95
		Small Project - Total		$ 525,000	$ 400,000	
Soroptimist Village	Great Falls	1/20/2012	Non-Profit	$ 480,000	$ 480,000	106
Blackfeet Homes V	Browning	1/20/2012	General	$ 631,225	$ 631,225	105
Parkview Village	Sidney	1/20/2012	Non-Profit	$ 403,013	$ 403,013	105
Depot Place	Kalispell	1/20/2012	General	$ 608,000	$ 608,000	105
		Non-Profit / General - Total		$ 2,122,238	$ 2,122,238	
		Grand - Total		$ 6,578,180	$ 2,522,238	Remaining $ 33,113

(if not requested in 2012 will carryforward to 2013)

	Setaside	Requests	App / Recom
Small Projects			
1st Round		$ 525,000	$ 400,000
2nd Round			
Non-Profit/General			
1st Round		$ 2,122,238	$ 2,122,238
2nd Round		$ -	$ -

credits recommended for qualifying non-profits = $ 480,000

EXHIBIT
A

Applications not Allocated/Withdrawn				Amount Requested		Criteria Points
North Stone Residence	Helena	1/20/2012	Non-Profit	$ 631,250	$ -	0
The Haven Homes	Missoula	1/20/2012		$ 125,000	$ -	73
Hillview Apartments	Havre	1/20/2012	General	$ 563,715	$ -	105
Stoneridge Apartments	Bozeman	1/20/2012	General	$ 631,250	$ -	103
Aspen Place	Missoula	1/20/2012	Non-Profit	$ 550,000	$ -	103
Deer Park Apartments	Dillon	1/20/2012	Non-Profit	$ 457,683	$ -	102
Freedoms Path	Fort Harrison	1/20/2012	General	$ 629,352	$ -	100
Red Fox Apartments	Billings	1/20/2012	General	$ 559,678	$ -	95
Courtyards Apartments	Kalispell	1/20/2012	Non-Profit	$ 539,264	$ -	93
-				$ -	$ -	0
-				$ -	$ -	0
			Total Applications not Funded	$ 4,055,942		
Applications not Ranked						
-				$ -		
-				$ -		
			Total Applications not Ranked	$ -		
			Grand Total Credits Requested	$ 6,578,180		

* Project information is on the second sheet of this excel workbook
L:\MultiFamily\LIHTC\ANNUAL APPLICATION AND ALLOCATIONS SUMMARY\[2012 Tax Credit Projects awarded.xls]Summary